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October Term, 1992

VIRGINIA CAROLINA TOOLS, INCORPORATED; AMERICAN METAL INDUSTRIES, INCORPORATED, d/b/a AMERICAN METAL INDUSTRY WHOLESALERS; and THE ROI GROUP, INCORPORATED,

Petitioners,

vs.

INTERNATIONAL TOOL SUPPLY, INCORPORATED and CURTIS PARK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Circuit correctly ruled that a court rather than an arbitrator should decide a dispute over the duration of a contract that contains both a broad arbitration clause and an express unambiguous termination date?

2. Whether the Fourth Circuit has rendered an opinion in conflict with the decisions of other circuit courts on the issue of the arbitrability of a contract duration dispute?

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STATEMENT OF THE CASE

In May 1991, Curtis Park, President and part owner of International Tool Supply ("ITS"), his family run business, was contacted by representatives of Virginia Carolina Tools ("VCT"), American Metal Industries, Inc. ("AMI") and The ROI Group, Inc. ("ROI") about the sale of ITS to ROI. Appendix to the Fourth Circuit ("4th Cir. App.") at 96. Park received a letter from ROI offering to purchase certain assets of ITS on December 12, 1991 (the "Option Agreement"). 4th Cir. App. at 96-97. On December 13, 1991, Park signed a faxed copy of the Option Agreement and returned it to ROI. 4th Cir. App. at 96-97.

This Option Agreement consists of five pages and one attached schedule and begins "[ROI] . . . is pleased to make the following offer . . . on the following terms and conditions." Appendix to Petitioners' Writ of Certiorari ("App.") at A-3. One such term provides that:

> Buyer [VCT] agrees, in consideration for Seller and Shareholder [Park] providing this option, to expend, on a best efforts basis, such time, effort and expenses as is required to consummate the transaction. In return, Seller and Shareholder agree to provide the Buyer with the exclusive right for 60 days (option period) from the date of execution of this agreement or before at Buyer's option, by Buyer's providing ten days written notice of exercise of option to Seller to consummate the transaction under the terms contained herein.

App. at A-3 - A-4, 4th Cir. App. at 57.

The Option Agreement also contains an arbitration clause which provides:

> Should any dispute arise between the parties they agree to seek resolution through the American Arbitration Association (AAA) . . . The arbitration will provide for both legal and equitable relief.

App. at A-4, 4th Cir. App. at 58.

In January 1992, John Magac, Vice President of VCT and ROI and Vice-Chairman of AMI, informed Park that the closing would not take place in mid-January, as had been promised earlier, because of financing complications between VCT and its bank, despite Park having been assured in December that financing was secured. 4th Cir. App. at 97.

On February 11, 1992, the Option Agreement, in accordance with its terms, expired. 4th Cir. App. at 89-90.

On or about March 1, 1992, Park received proposed closing documents from VCT's attorneys. 4th Cir. App. at 98. Included in these documents were a 69-page asset purchase agreement and several other agreements. However, none of the agreements contained a proposed closing date. App. at A-5. Park forwarded these documents to his attorney and accountant for review. 4th Cir. App. at 98.

After discussions with his attorney and accountant concerning the proposed documents, Park decided that ITS would terminate all negotiations with ROI and VCT concerning the purchase of ITS's assets. 4th Cir. App. at 98. On March 18, Park informed Michael Daspin ("Daspin"), Vice Chairman of ROI, that ITS was terminating negotiations with ROI and that ITS and ROI had no agreement because the option period had expired. 4th Cir. App. at 99. On March 19, Park received a letter via

fax from VCT's attorneys, noticing Park and ITS that VCT intended to close under the Option Agreement. 4th Cir. App. at 99. The letter stated that the closing would occur in Charlotte although the Option Agreement stated that any closing would occur at ITS' offices in Tennessee. 4th Cir. App. at 99.

On March 20, 1992, Park mailed a letter to Daspin, certified mail, return receipt requested, confirming the March 18 conversation in which Park informed Daspin that ITS was terminating negotiations with ROI and VCT. 4th Cir. App. at 99.

Also on March 20, 1992, ROI, VCT and AMI filed a Complaint and Motion to Compel Arbitration, a Notice of Intention to Arbitrate and Statement of Claim and a Motion for a Temporary Restraining Order and Order to Show Cause in the State Court of North Carolina, Mecklenburg County, Superior Court Division against ITS and Park.

ITS and Park removed the action to the United States District Court for the Western District of North Carolina and filed their Answer in that Court, and thereafter filed a Motion for Injunctive Relief to enjoin Plaintiffs from arbitrating this dispute. App. at A-5 – A-6.

The district court heard arguments on Plaintiffs' Motion to Compel and Motion for Injunctive Relief and on ITS and Parks' Motion for Injunctive Relief and entered an order granting Defendants' Motion for Injunctive Relief enjoining Plaintiffs from arbitrating this dispute. App. at A-27 – A-28. The district court found that

the Option Agreement contained an express, unambiguous expiration date, rebutting the presumption of arbitrability and that the question of whether the Option Agreement was extended was for the court, not the arbitrator. App. at A-23.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's order, characterizing the specific issue before it as "whether a dispute over the duration of a written option agreement having a broad arbitration clause and a facially unambiguous termination date is for the court or the arbitrator." *Virginia Carolina Tools v. International Tool Supply*, 984 F.2d 113 (4th Cir. 1993) (hereinafter "*ITS*"); App. at A-2. Relying on precedent of this Court, the Fourth Circuit first decided that a court, not an arbitrator, should decide the issue of the arbitrability of the contract duration issue. The Fourth Circuit found that, unless parties clearly and unmistakably provided by contract for arbitration of arbitrability issues, "the parties did not intend to submit the very issue of the scope of arbitrability itself to arbitration." *ITS*, 984 F.2d at 117.

After this initial determination, the Fourth Circuit held that the dispute over contract duration was an issue to be decided by a court, not an arbitrator. *Id.* at 119. To refrain from reaching the merits of the underlying dispute, the Fourth Circuit approached the contract duration issue as one involving interpretation of the parties' intent to submit such issues to arbitration as expressed in the Option Agreement. *Id.* at 118. The Fourth Circuit recognized the general presumption in favor of arbitrability, but found that because the dispute was over the very continuation of the contractual obligation and because

the contract contained an express termination date, an intent of the parties to submit the issue of contract duration to arbitration could not be inferred. *Id.* The Fourth Circuit concluded by distinguishing earlier decisions of the Fourth Circuit and this Court that had addressed issues different from those before the Fourth Circuit in *ITS*. *Id.* at 119.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Correctly Ruled That A Dispute Over The Duration Of A Contract Containing A Broadly-Phrased Arbitration Clause And An Express Termination Date Is A Question For The Court, Not The Arbitrator.

A. The Fourth And D.C. Circuits Have Both Held That A Dispute Over The Duration Of A Contract Which Has Both A Broadly Phrased Arbitration Clause And An Unambiguous Termination Date Is An Issue For The Court.

Respondents are aware of only two reported decisions that examine the issues decided by the district and appellate courts below.[1] The D.C. Circuit in *National R.R.*

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[1] The Second Circuit in *Korody Marine Corp. v. Minerals & Chems. Philip Corp.*, 300 F.2d 124 (2d Cir. 1962) (per curiam) briefly addressed the issue of the arbitrability of a contract duration dispute and affirmed the trial court's decision not to refer the dispute to arbitration. Without extensive discussion, the court concluded:

> We see no reason not to accept the trial judge's factual conclusion that the parties did not agree to renew the contract which expired December 31, 1960.

Passenger Corp. v. Boston & Maine Corp., 850 F.2d 756 (D.C. Cir. 1988) and the Western District of Virginia in *Liberty Univ. v. Kemper*, 758 F. Supp. 1148 (W.D. Va. 1991) both articulated a clear set of guidelines for determining the arbitrability of contract duration disputes and both the Western District of North Carolina and the Fourth Circuit in *ITS* consistently applied these legal principles to the facts of the present case. In their Petition for Writ of Certiorari, petitioners have attempted to confuse the clearcut principles of the Fourth and D.C. Circuits by citing other circuit opinions which address different factual and legal issues. To best illustrate these distinctions, a brief discussion of the D.C. Circuit and Fourth Circuit opinions is necessary.

In *ITS*, the Fourth Circuit limited its holding to the issue of "whether a dispute over the duration of a written option agreement having a broad arbitration clause and a facially unambiguous termination date is for the court or the arbitrator." 984 F.2d at 115; App. at A-2. Similarly, the D.C. Circuit in *National R.R.* framed the issue before it as "whether the parties, at the time they entered into the contract, intended that disputes over the duration of the contract would be decided by a court or by the arbitrators. . . . " *National R.R.*, 850 F.2d at 760. The *ITS* and *National R.R.* decisions provide a sensible, workable framework for deciding the arbitrability of disputes over contract duration.

> There is no claim that any of the transactions in question took place before the expiration of the contract. The fact that the parties continued to deal under some sort of informal arrangement does not mean that the terms of the expired formal contract continued to apply.

Korody, 300 F.2d at 125.

Under this framework, if an agreement contains a broadly-worded arbitration clause, then the presumption exists that disputes over contract duration will be decided by an arbitrator. The presumption in favor of arbitration can be rebutted by a clear showing that the parties did not intend such a result. This clear showing can be an express expiration date in the agreement or proof that the parties agreed to terminate the agreement containing the arbitration clause or just the arbitration clause. *See National R.R.*, 850 F.2d at 763; *ITS*, 984 F.2d at 118. If the party seeking to avoid arbitration makes this clear showing then the issue of contract duration should be decided by the court. This framework has been followed without any confusion by the lower courts. *See Virginia Carolina Tools, Inc. et al. v. International Tool Supply*, 793 F. Supp. 664 (W.D.N.C. 1992), *aff'd*, 984 F.2d 113 (4th Cir. 1993); *Liberty Univ., Inc. v. Kemper Sec. Group, Inc.*, 758 F. Supp. 1148 (W.D. Va. 1991) (following *National R.R.* analysis to determine arbitrability of dispute over contract duration).

In addition to the reliability and common sense of this framework, several important policies are furthered when the above analysis is used. First, if arbitrators are automatically allowed to decide contract duration issues, the reliability and trustworthiness of such decisions is called into question. Arbitrators have a vested interest in deciding that an agreement has not expired or been terminated. The arbitrator is given the power to decide an issue having a direct impact on the viability of the arbitration claim. If the arbitrator decides that the parties did intend that contract duration disputes be submitted to

arbitration, the arbitrator continues the arbitration and receives the benefits thereof.

Second, a party's willingness to enter into an arbitration agreement would be diminished by a rule automatically submitting all questions of contract duration to arbitration. "[P]arties must be able effectively to provide for the expiration of their obligation to arbitrate – including their obligations to arbitrate questions of contract duration." *National R.R.*, 850 F.2d at 762. Even a contract " . . . with a very broad arbitration clause is usually meant to have a finite duration." *Id.* Contract duration issues involve "the very continuation of contractual obligations" and such disputes should not be blindly referred to arbitration. 984 F.2d at 118; App. at A-11.

Finally, parties that intend for contract duration disputes to be decided by an arbitrator need simply express such an intent in their agreement. Just as parties must express their intent to commit the threshold question of who decides arbitrability disputes to an arbitrator, parties can just as easily provide in their agreements that any disputes, including those concerning duration, existence or termination of the contractual relationship between the parties, be submitted to arbitration.

B. The Fourth Circuit's Analysis Does Not Require An Adjudication Of The Merits Of The Underlying Dispute.

In *ITS*, the Fourth Circuit was acutely aware of this Court's admonition in *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), against deciding the potential merits of the underlying claims.

The Fourth Circuit explicitly rejected an approach to solving the arbitrability of a contract duration dispute that would have involved "deciding, or coming close to deciding" the merits. 984 F.2d at 118; 4th Cir. App. at A-9. Instead, the Fourth Circuit treated the contract duration issue as one of contract interpretation and refrained from any adjudication of the merits. *Id.*

Petitioners assert in their petition that the Fourth Circuit's analysis "give[s] insufficient weight to this Court's warning in *AT&T Technologies*" and that petitioner's claim "succeeds or fails on the question of whether the contract . . . had expired by March 18, 1992." Petition for Writ of Certiorari ("Pet.") at 15. However, in determining that a court not an arbitrator is to decide the issue of contract duration, the Fourth Circuit did not reach the merits of the underlying issues of when, if at all, the contract expired, whether the contract was in effect when VCT attempted to notice closing of the transaction, and, if so, what the terms of that contract were. All these issues remain to be decided.

The D.C. Circuit in *National R.R.* discussed at length the differing approaches to resolving contract duration issues and how these approaches affect the merits of the underlying dispute. *National R.R.*, 850 F.2d at 759-60. The D.C. Circuit concluded that the court's function in determining the arbitrability of a contract duration dispute is to determine the intent of the parties as to arbitrating such disputes. The D.C. Circuit stated:

> [R]egardless of whether the substantive terms of the contract are currently in force, the arbitration clause either requires disputes over expiration of the contract to be submitted to

> arbitration or it remits such disputes to the courts.

National R.R., 850 F.2d at 760. Using an approach similar to the D.C. Circuit, the Fourth Circuit has heeded this Court's warning in *AT&T Technologies* and has made no attempt to resolve the merits of the underlying dispute.

II. The Fourth Circuit Has Not Rendered an Opinion in Conflict With the Decision of Other Circuit Courts on the Issue of the Arbitrability of a Contract Duration Dispute.

A. Petitioners' Attempts To Create A Split Among The Circuits Must Fail Because Decisions Cited By Petitioners Address The Arbitrability Of Issues Different From Those Decided By The Fourth And D.C. Circuits.

Recognizing the distinction between this case and other decisions regarding a contract's validity, termination, abandonment or repudiation is important. Unlike a termination, abandonment or repudiation case, respondents need not prove or show any conduct on their part that cuts off the existence of the Option Agreement (and, therefore, the duty to arbitrate). Instead, the Option Agreement according to its express terms expired on February 11, 1992, without any affirmative act of either party. This express unambiguous termination date rebuts the presumption in favor of arbitration when a conflict over contract duration arises and a court is then the proper forum for resolution of this dispute.

1. The Ninth Circuit Cases Cited By Petitioners Involve Collective Bargaining Agreements And Are Irrelevant As To The Issues Presented In This Case.

Petitioners cite the Ninth Circuit opinions in *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), (hereinafter *"Camping Construction"*) *cert. denied*, ___ U.S. ___, 111 S. Ct. 1684, 114 L. Ed. 2d 79 (1991) and *cert. denied*, ___ U.S. ___, 111 S. Ct. 2260, 114 L. Ed. 2d 713 (1991) and *McKinney v. Emery Air Freight Corp.*, 954 F.2d 590, 593 (9th Cir. 1992) as conflicting with the Fourth Circuit's decision in *ITS* and the D.C. Circuit's opinion in *National R.R.* Petitioners assert that these Ninth Circuit decisions hold that a broad arbitration clause requires submission of contract termination disputes to arbitration. *See* Pet. at 8-9. However, the Ninth Circuit has yet to address a dispute over the arbitrability of contract duration issues.

In *Camping Construction*, the Ninth Circuit addressed the issue of "the arbitrability of a labor dispute under a 'prehire' collective-bargaining agreement when one of the parties claims to have repudiated that agreement." 915 F.2d at 1334. The parties had entered into a prehire collective bargaining agreement, in which the employer agreed to abide by the labor unions' Master Agreement and any extensions or renewals thereof. *Id.* at 1335. The employer, approximately 1½ years later, refused to engage in any collective bargaining or execute any further agreements. *Id.* Unlike the automatic expiration of the Option Agreement in *ITS*, the employer in *Camping Construction* was required to take "formal action to repudiate the agreement *or to prevent its automatic renewal.*" *Id.* (emphasis

added). No such action was taken. *Id.* The labor unions filed a grievance and sought arbitration under the broadly phrased arbitration clause contained in the Master Agreement. The employer refused to arbitrate, arguing that it had terminated or repudiated the contract between the parties. *Id.* at 1337. The district court granted summary judgment for the labor unions on the issue of termination, finding that an arbitrator must decide whether the conduct of the labor union terminated the agreement. *Id.* at 1340. The Ninth Circuit upheld this decision, but remanded the case to the district court to resolve the issue of repudiation. *Id.* In its analysis, the Ninth Circuit stated:

> [O]nce it is found that a contract did exist at some time, the questions of whether that contract has expired, or has been terminated or repudiated, *may well* present arbitrable issues, depending on the language of the agreed-upon arbitration clause.

Id. at 1340 (emphasis added). Consequently, the Ninth Circuit decision in *Camping Construction*, although factually-distinct, used an approach similar to the Fourth and D.C. Circuit's analysis of determining the intent of the parties to decide the arbitrability of a contract duration dispute.

The Ninth Circuit's decision in *McKinney* is also inapposite. *McKinney* involved the issue of whether a collective bargaining agreement had ever existed between the parties. *McKinney*, 954 F.2d at 593. In deciding this issue, however, the Ninth Circuit distinguished labor agreements from commercial contracts, stating:

> The labor agreement is the method of implementing our national labor policy, but it is not a run-of-the-mill commercial contract . . . To interpret such an agreement and to determine whether a contract has been terminated or abrogated, 'the governing criteria are not judge-made principles of the common law but the practices, assumptions, understandings and aspirations of the going industrial concern.'
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> * * *
>
> [S]killed labor arbitrators, rather than judges, are better positioned and equipped to identify and to apply the common law of the shop.

Id. at 594-95 (cit. omit.). These "industrial concerns" are not present in the facts of this case and any language quoted by petitioners from these collective bargaining cases should be viewed in that context.

Finally, petitioner cites the Ninth Circuit decision in *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1294, 117 L. Ed. 2d 516 (1992) in support of its argument that the Ninth Circuit decisions conflict with the Fourth and D.C. Circuits. However, the decision in *Republic of Nicaragua* concerned the validity of an arbitration agreement and not the duration of that agreement and, therefore, no split between the Ninth Circuit and the Fourth and D.C. Circuits exists.

2. The Second And Seventh Circuit Opinions Cited By Petitioners Do Not Conflict With The Fourth And D.C. Circuit Decisions.

Petitioners cite *Rochdale Village, Inc. v. Public Serv. Employees Union*, 605 F.2d 1290 (2d Cir. 1979) as the Second Circuit decision which conflicts with the Fourth and D.C. Circuit's opinions regarding arbitrability of contract duration issues. The issue decided by the Second Circuit in *Rochdale Village* involves contract termination. However, in *Rochdale Village*, although the contract contained an express termination date, the contract also specified that the agreement would automatically renew unless either party gave notice of its intention to terminate or modify the agreement within a specified time period prior to the expiration of the agreement. *Rochdale Village*, 605 F.2d at 1293. The Second Circuit held that in spite of the contract's automatic renewal provision, the issue of whether the parties *separately* agreed to alter the duration of the agreement was a question to be determined by the court. *Id.* at 1296-97. Therefore, the decision in *Rochdale Village* actually supports Defendants' position that a court, not an arbitrator, should decide the issue of contract termination.

The Seventh Circuit's decision in *Flender Corp. v. Techna-Quip Co.*, 953 F.2d 273 (7th Cir. 1992) is cited by petitioners for the proposition that when a contract contains a broad arbitration clause, issues of contract validity are for an arbitrator. Pet. at 9-10. *Flender Corp.* involved the purported termination of an agency agreement with a broad arbitration clause upon the dissolution of Techna-Quip, a party to the agreement. *Flender Corp.*, 953 F.2d at 275. Flender sought to avoid arbitration of the dispute by

claiming that Techna-Quip's change in corporate form terminated the agency agreement. *Id.* There was no dispute over the duration or expiration of the contract. The Seventh Circuit examined the arbitration clause, which stated that "any controversy or claims relating to any aspect of this agreement . . . *or to the relationship created* shall be settled by arbitration" and found that the phrase "to the relationship created" was broad enough to include Flender's relationship with the one owner of Techna-Quip with whom Flender did business. *Id.* at 278 (emphasis added). Consequently, the Seventh Circuit's decision in *Flender Corp.* involved an issue of contract termination, not duration, and the interpretation of a different arbitration clause, which the Seventh Circuit found broad enough to cover the particular dispute before it.[2]

3. The Third And Sixth Circuit Decisions Cited By Petitioners Decisions Involve Issues Different From Those In The Fourth And D.C. Circuit Opinions.

Petitioners attempt to lump decisions from the Third and Sixth Circuits with the Fourth Circuit's decision in *ITS* and the D.C. Circuit's decision in *National R.R.* However, the Sixth Circuit in *Roney & Co. v. Kassab*, 981 F.2d

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[2] Curiously, petitioners fail to mention the Seventh Circuit's decision in *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 872 (7th Cir. 1985), in which the Seventh Circuit stated, "[i]ssues going to the validity of the entire contract, including the arbitration clause, are for the arbitrator *when the parties so intend.*" (emphasis added).

894 (6th Cir. 1992) and the Third Circuit in *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507 (3d Cir. 1990) both dealt with Rule 603 of the New York Stock Exchange, which provides that an aggrieved party must commence arbitration proceedings within six years from the disputed transactions. Both the Third and Sixth Circuits have held that the issue of whether the claimant brought the action within the applicable 6 year statute of limitations was for the court and not the arbitrator. Therefore, both the Third and Sixth Circuit opinions cited by petitioners dealt with the timeliness of the arbitration request and espoused no opinion or holding regarding disputes over the duration of the underlying contractual obligation. Consequently, no split in the circuits over the issue of the arbitrability of contract duration exists.

B. The Fourth Circuit Has Not Rendered A Decision In Conflict With The Decisions Of Other Circuit Courts Or This Court On The Issue Of Severability.

Petitioners assert that the Fourth Circuit has violated the direction of this Court's opinion in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) which discusses the "severability" of an arbitration clause from the remainder of a contract in the fraudulent inducement context. Petitioners' assertion must fail for two reasons. First, the Fourth Circuit directly addressed, distinguished and resolved any purported conflict with other decisions concerning the "severability doctrine." Second, the holding in *Prima Paint* has been limited to its facts and, in fact,

this Court has sanctioned the same type of analysis implemented by the Fourth Circuit in this case.[3]

The Fourth Circuit recognized that *Prima Paint* and other decisions "stand for the propositions that obligations to arbitrate do not invariably terminate upon termination of the underlying contract's prime obligations." 984 F.2d at 119. However, the Fourth Circuit correctly found that the question of whether the obligation to arbitrate survives the expiration of the contract "depends upon whether the law can impute such an intention to the parties." *Id.* (citing *Nolde Bros., Inc. v. Local 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 255 (1977) and *Prima Paint*, 388 U.S. at 402, n. 9). The Fourth Circuit did not engage in a level of review that goes beyond the tenants of the severability doctrine. Instead, the Fourth

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[3] In addition to this Court's recognition in *Prima Paint* and *Nolde Brothers* of the importance of addressing parties' intentions in committing a dispute to arbitration, this Court has limited *Prima Paint's* holding to the issue of whether a claim of fraudulent inducement should be arbitrated. Although this Court's opinion in *Prima Paint* contains broad language concerning the arbitrability of disputes, the decision in *Prima Paint* did not involve issues of contract duration and is not controlling in the instant case. In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), a case relied upon by petitioners, this Court reviewed the *Prima Paint* decision, noting that "[t]he issue before us [in *Prima Paint*] was whether the issue of fraud in the inducement was itself an arbitrable controversy." *Moses H. Cone*, 460 U.S. at 24. While acknowledging the federal policy favoring arbitration, this Court stated " . . . our holding in *Prima Paint* extended only to the specific issue presented . . . ." *Id.* Thus, this Court's decision in *Prima Paint* does not control this case.

Circuit simply reiterated that it found no intention of the parties to commit the duration dispute to arbitration. *Id.*

With this distinction in mind, Petitioners' "conflict among the circuits" are meaningless. Petitioners draw artificial distinctions among circuit court decisions. For instance, petitioners claim that the Eighth and D.C. Circuits conflict with both the Second, Third, Fourth, Sixth, Seventh and Ninth Circuits as to what evidence a court is to consider in determining "whether a dispute over the termination or validity of a contract is arbitrable." Pet. at 15. First, the issue before the Fourth Circuit in *ITS* involved the issue of contract duration, not the issues of contract validity and termination. Second, the language quoted by the Petitioners in the Eighth Circuit's decision in *Actors' Equity* supports rather than conflicts with the Fourth Circuit's decision in *ITS*. *See Actors' Equity Ass'n v. America Dinner Theater Inst.*, 802 F.2d 1038 (8th Cir. 1986) ("Although the arbitration clause itself may appear to order arbitration, other provisions of the contract may clearly and unambiguously negate or limit the applicability of the arbitration clause.") (citing *Nolde Brothers*, 430 U.S. at 255). The Fourth Circuit looked to the express termination date as evidence of the parties' intent not to submit a contract duration dispute to arbitration and found that such evidence rebutted the presumption favoring arbitration. The Fourth Circuit in *ITS* used the same standard as the D.C. and Eighth Circuits in *National R.R.* and *Actors' Equity* and no conflict exists.

C. Petitioners, Not The Circuit Courts, Have Created Any Confusion About A Substantive/Procedural Dichotomy In The Circuit Courts, The Resolution Of Which Has No Application To This Case.

The confusion among the circuits asserted by Petitioners amounts to a prognostication that the Ninth Circuit "would likely" come to exactly the opposite conclusion from the Fourth Circuit and other circuit courts on the arbitrability issue. Pet. at 23. Petitioners base this assumption of confusion upon the Ninth Circuit's use of the severability doctrine in *Republic of Nicaragua*, a case involving a dispute over the formation of a contract containing a broadly-worded arbitration clause. Petitioners forecast that the Ninth Circuit would apply the severability doctrine to the issue of the arbitrability of a contract duration dispute, an issue the Ninth Circuit has never addressed, and would reach a conclusion contrary to the Fourth Circuit's decision in *ITS*.

The only cases cited in Petitioners' assertion that "confusion" among the circuits exists as to substantive procedural distinctions involve statute of limitations cases. The Fourth Circuit's decision in *County of Durham v. Richards & Assoc., Inc.*, 742 F.2d 811 (4th Cir. 1984), this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) and the Third Circuit decisions in *PaineWebber, Inc. v. Hartman*, 921 F.2d 507 (3d Cir. 1990) and *National Iranian Oil Co. v. Mapco International*, 983 F.2d 485 (3d Cir. 1992) all involve issues relating to time bars to arbitration of admittedly arbitrable disputes. Therefore, even if the Ninth Circuit "would likely" reach a result contrary to the Third and Fourth

Circuits' decision, any resulting confusion or conflict would involve issues different from the contract duration issue decided by the Fourth Circuit in *ITS*.

The analysis used by the Fourth Circuit in *ITS* and the D.C. Circuit in *National R.R.* creates no confusion. According to the holdings of these two circuit courts, if a contract contains a broadly-phrased arbitration clause, the parties are presumed to have intended to arbitrate disputes over contract duration issues. The party resisting arbitration must then make a "clear showing" that the parties did not intend to submit such a dispute to arbitration and may do so by establishing that the contract contained an express termination date. This straight-forward analysis resolves the issue of arbitrability without relying on awkward substantive/procedural distinctions, which even according to Petitioners have been labeled as "ofttimes meaningless." Pet. at 24. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-57 (1964) ("[D]isputes of the kind involved here cannot be broken down so easily into their 'substantive' and 'procedural' aspects. Questions regarding the procedural requisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute.")

CONCLUSION

For these foregoing reasons, this petition for writ of certiorari should be denied.

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